

# French Case on Lis Pendens under Brussels II bis Regulation

The French Supreme Court for Private and Criminal Matters (*Cour de cassation*) handled an interesting decision earlier this year on lis pendens under Regulation 2201/2003 of 27 November 2003 (Brussels IIbis).



In this case, two spouses initiated divorce proceedings in England and France **the same day**. The spouses were French nationals who had married in 1996 before moving to England in 2004 with their child (born in Japan). On March 24, 2005, the husband introduced an action in France under Article 3(b) of the Regulation (common nationality of the spouses). On the same day, the wife introduced an action in England under Article 3 (a) of the Regulation (habitual residence).

Which court, then, was to retain jurisdiction?

The wife provided evidence of the time when her husband was served with the English relevant documents: 12:30 pm, at his work place. French trial judges found that, by contrast, the husband was unable to provide evidence of the time when the French court had been seized.

In a judgment of 11 June 2008, the *Cour de cassation* held that he had the burden of proof, and that it was therefore for him to prove that the French court had been seized earlier than the foreign court on the relevant day. As a consequence, the court ruled that the English court had been seized first, and that the French court had been right to stay its proceedings.

In any case, in the meantime, the English High Court had actually ruled on the merits in a judgment of 13 July 2007. It seems that its jurisdiction was not challenged, as the defendant did not enter into appearance in England.

### **Impossible n'est pas français**

Unlike other French proceedings, divorce proceedings are not initiated by serving the other party, but by filing with the court. In the present case, this raises two issues.

First, it is somewhat paradoxical to ask the husband to provide evidence to a court of the time when *that* court was seized. One would have hoped that the court would know. And it is even more paradoxical to tell him that he loses if he cannot bring such evidence.

Second, none of the French courts involved in that case cared for the fact that there was no mechanism to certify the time when the proceedings were filed. I suspect that the standard receipt mentions only the day. The argument was put forward that, as a consequence, parties in different states were not put on an equal footing. Indeed, if most French courts are unable to provide evidence of the time when they are seized, this will mean that other courts of the EU which can provide such evidence will always be seized first, at least from a French perspective.